IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1284 OF 2006

In

SUIT NO.924 OF 2001

Mr.Anil K. Bodani & Anr. : Plaintiffs

V/s.

Manju Meadows Pvt. Ltd. & Ors. : Defendants

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Mr.Y.R.Dhond with Mr.B. Saraf and Mr.M. Rai i/b. M/s.M/s.Negandhi, Shah & Himayatullah for the plaintiffs.

Mr.Cyrus Ardeshir i/b. M/s.Kanga & Co., for defendant no.1.

Mr.Shyam Mehta with Mr.Gaurav Kothari i/b. M/s.Advani & Co., for defendant no.2.

Mr.Subodh Joshi i/b. M/s.Parimal Shroff & Co., for defendant nos.3, 11 & 12.

Mr.Vinod Singh i/b. Ms.Shivalkar & Co., for defendant no.21.

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CORAM : S.A.BOBDE, J.

DATE : FEBRUARY 2, 2007.

P.C.

1. By this Notice of Motion, the plaintiffs seek permission to institute proceedings in the name of and on behalf of the defendant no.1 company to challenge the ex parte decree dated 24.10.2005 passed against the defendant no.1 company in Summary Suit no.3304 of 2004. The company apparently is not interested in having this ex parte

decree set aside. In this Suit no.924 of 2001, the plaintiffs have sued for a declaration that they own 17,990 equity shares of the face value of Rs.100/- each and 7,000 shares of the face value of Rs.100/- each of the 1st defendant company. Their claim in the suit is that they have a majority share holding. The contention of the defendant-company is that the majority shareholding is that of the defendant nos.2 to 15. That is a matter which could be eventually decided in the suit.

2. Admittedly, Suit no.3304 of 2004 has been decreed against the defendant no.1 on 24.10.2005 ex parte. The decree is for a sum of about Rs.63 lakhs. The defendant-company has, however, not made the usual application for having the ex parte decree set aside and for having the suit decided on merits. That is the reason why the plaintiffs have taken out this Notice of Motion.

3. According to the plaintiffs, since they have a vital interest in the company, presently denied by the Board of Directors, they are interested in ensuring that the company does not suffer an ex parte decree. Therefore, they have made this application by way of Notice of Motion. The learned counsel for the plaintiffs submits that though normally it is the discretion of the Board of Directors to sue on behalf of the company, there are cases

where the Board may unjustifiably refuse to do so. In such case, a shareholder or a group of shareholders may bring a derivative action with the permission of the Board.

4. It is, therefore, necessary to see whether the defendant-company has any justification for not applying to set aside the ex parte decree. The learned counsel for the company submitted that the amount for which an ex parte decree has been passed has been shown by the defendant-company as a liability and, therefore, they do not wish to contest the ex parte decree. If this is entirely true, indeed, this company ought to be treated as a model litigant. However, it is well-known that decrees are nonetheless contested not merely on the question of liability for the principal sum, but also the rate of interest often levied by a Court while decreeing the claim. Apparently, the defendant-company seems to have no regard for this. Nonetheless, what appears to be true on a preponderance of probabilities is that the defendant-company is controlled by the Board of Directors whose interests are adverse to that of the plaintiffs and that is why the company has not made any application for having the decree set aside. If this is so and indeed it does appear to be so, the refusal of the company for having this ex parte decree set aside is not justified.

Similar contention was also raised by the defendant no.2 who is a Director on the Board. There is no merit in the contention on behalf of the defendants. In the circumstances, I am of view that it would be appropriate to permit the plaintiffs to bring a derivative action on behalf of the defendant no.1 company for having the ex parte decree set aside. The relief, if any, will go to the company.

5. It might be useful here to refer to Ramaiya's Guide to the Companies Act (Sixteenth Edition) where this kind of action is described as follows:-

> "In the first place proceedings on behalf of a company is the domain of management. The company's Board of Directors is empowered by s. 291 to exercise all the powers of the company which include the power to proceed against persons who are damaging the company's interests. Secondly where, for one reason or another, directors fail to live up to their duties, the courts have been authorising under a derived authority a shareholder or some shareholders to sue on behalf of the company for asserting the company's rights. Relief, if any, will go to

> the company. This is commonly known as derivative action. A third form of proceedings is known as a representative action."

6. In view of the above, the Notice of Motion is allowed. The plaintiffs may institute an application for setting aside the ex parte decree in their own names on behalf of the defendant-company.

7. Mr.Ardeshir on behalf of the defendant-company applies for stay of this order. Apparently, the company is not satisfied with refusing to apply for having the ex parte decree set aside which, in my opinion, it ought to have applied for a long time ago. In the circumstances, the application for stay is rejected.

S.A. BOBDE, J.